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SUBJECT: SECOND UNCAC WORKSHOP ON BRIBERY IN INTERNATIONAL
ORGANIZATIONS

SUMMARY

1. On January 28-29, 2009, the UN Office on Drugs and Crime (UNODC) hosted the second open-ended experts workshop on International Cooperation between Public International Organizations and States Parties to the UN Convention Against Corruption (UNCAC). Workshop participants discussed ways to improve cooperation between government authorities and international organizations (IO's) in addressing bribery and other corruption cases involving IO officials. Delegates from 40 countries and 20 IO's ultimately adopted recommendations based largely on conclusions drafted by the U.S. delegation. These include a call for written guidelines for cooperation, regular meetings between the organizations and appropriate law enforcement authorities to ensure proper communication, and early notification to those authorities of credible allegations of corruption.

2 SUMMARY CONTINUED: UNODC hosted a second meeting during the afternoon of January 29 of the members of the UN Chief Executive Board (CEB) representing most of the international organizations in the UN system. Member State experts were allowed to observe. At this meeting, IO representatives discussed progress in implementing UNODC's Integrity Initiative, a voluntary effort by the IO's to integrate UNCAC principles into operational practices. UNODC discussed efforts to collect information on the work being done by IO's involved and post them on a website accessible by other IO's. With only two thirds of the organizations reporting, progress has been slow, and UNODC urged participants to show more progress when the issue is revisited during the Third UNCAC Conference of States Parties (COSP), currently scheduled for November in Doha. END
SUMMARY

BACKGROUND: GETTING TOGETHER MEMBER STATES AND IOS

3. The current workshop resulted from the 2003 UN General Assembly resolution adopting the text of the UNCAC, which also mandates that the UNCAC COSP consider ways to strengthen action against bribery and corruption in international organizations, taking into account privileges and immunities and jurisdiction. The first COSP, held in Jordan in December 2005, directed the establishment of an open-ended dialogue bringing together Member States and interested international organizations to consider these issues. UNODC subsequently hosted its first workshop on the topic in Vienna from September 27-28, 2007. The issue was revisited again at the second COSP in Bali, Indonesia in January-February 2008. The second COSP ultimately recommended the continuation of the open-ended dialogue, with a main purpose to exchange best practices and to address the technical issues highlighted during the first workshop, namely cooperation between international organizations and Member States, the exchange of information on on-going investigations, and issues related to jurisdiction. The U.S. played a major role in drafting both COSP pronouncements on this subject and has provided

significant expertise to both workshops.

U.S. DELEGATION AND GOALS

14. The U.S. delegation (USDEL) to the January 27-28 workshops consisted of Patt Prugh, Office of the Legal Adviser, Law Enforcement & Intelligence, Department of State; James Gresser, Office of the Legal Adviser, Diplomatic Law, Department of State; Mark Mendelsohn, Fraud Section, Criminal Division, Department of Justice; and John Brandolino, INL Senior Advisor to UNVIE. The purpose of the U.S. participation in the workshop was to provide expert information on U.S. practices, to guide the workshop discussions to avoid a result that would be inconsistent with U.S. policies or laws, to learn from other delegations, and to assist both international organizations and the COSP in their efforts to deter and detect corruption and fraud.

CRIMINALIZING PASSIVE BRIBERY OF IO OFFICIALS

15. The French delegation commenced substantive discussions with an intervention highlighting the importance of criminalizing "passive bribery" - the acceptance of a bribe by a member of the IO staff. UNCAC obligates States Parties to criminalize the active bribery of officials (offering a bribe to an official of a public international organization), but not the criminalization of passive bribery of officials of public international organizations. In a private conversation, a UNODC official noted that the U.S. does not expressly criminalize passive bribery, and asked USDEL whether we wished to discuss the U.S. position. We declined to discuss the matter on the floor but explained to UNODC staff that although passive bribery is not an offense under the FCPA, there are other statutory offenses that may cover this conduct, for example, federal wire fraud. (COMMENT: Although not required under the UNCAC, the

Department of Justice may wish to consider whether there would be merit to criminalizing passive bribery. END COMMENT)

INTERFACE BETWEEN MEMBER STATES AND IO'S

16. Subsequent discussions concerned the interface between IO's and the prosecutorial authorities of the Member States having jurisdiction over an act of corruption. USDEL and other delegations expressed the view that early notification to national authorities was important in all criminal cases, but particularly in bribery and corruption cases which frequently are complex and involve rapid and multiple movements of funds. A number of IO representatives cautioned that early notification would require a waiver of privileges and immunities. It was noted by the USDEL that notification and waiver were distinct, and that even in those cases where waiver was necessary, waivers could be limited. The UN's Office of Investigative Oversight Services (OIOS) in Vienna noted that under current UN regulations, an employee can be sanctioned for divulging information outside the IO. The USDEL intervened to say that such policies clearly run contrary to the interests of the organization to detect and deter corruption, and that IO's need to reverse the culture of protectionism that uses immunity to shield internal corruption. The interests of justice should take precedence over an IO's desire to investigate and take personnel actions for misconduct. (COMMENT: This issue may be fertile field for a future decision by the third COSP in November. END COMMENT)

DEALING WITH MULTIPLE JURISDICTIONS

17. During the workshop, it was noted that in addition to the state with territorial jurisdiction, other states could also conceivably have a jurisdictional basis to try individuals who would abuse their positions of trust and confidence in an IO for corrupt purposes. One example would be the state having active personality jurisdiction when one of its nationals commits the offense. The USDEL internally discussed whether an IO should be encouraged to

notify all states with the potential to assert jurisdiction, and, if so, whether a preference should be given to the Member State with territorial jurisdiction (the offense was committed within its territory). We decided not to raise these issues without first bringing these matters to the attention of USUN and other interested U.S. entities. Neither U.S. domestic law nor customary international law imposes a priority regime among states having bases to prosecute for the same offense. In the afternoon discussions, UNODC posed a number of questions for the workshop to consider. Among them was whether there were adequate provisions for IO's to recover assets lost as a result of internal bribery or corruption. USDEL explained the process available to IO's in the U.S. that permits them to recover through the government's prosecution under the Foreign Corrupt Practices Act (FCPA). Following this intervention it was noted that the potential for asset recovery provided an added incentive for IO's to promptly inform national authorities when the IO learns of credible evidence that an IO has been the victim of bribery or corruption.

USDEL PUSHES RECOMMENDATIONS

¶18. UNODC sought to end the workshop by offering the participants a number of "conclusions" to be adopted by consensus. Very lively discussion ensued, with a number of delegations objecting that the workshop had not been asked to reach conclusions and the participants had not been authorized by their authorities to take such action. USDEL specifically objected to the first proposed recommendation, which stated that Member States should revise their domestic laws to ensure the admissibility of evidence gathered by international organizations. UNODC agreed to withdraw the recommendation. The representative of the UN Office of the Legal Adviser questioned the meaning of the term consensus, and also questioned whether any agreement could be reached. At this point, the discussions rapidly deteriorated and it appeared we would not have any agreement on the content of the workshop report.

¶19. USDEL then requested an opportunity to share several points for inclusion in the report that the group would prepare for the third COSP in Doha. Other delegations supported the U.S. intervention and requested that the U.S. summary of the discussion replace the "conclusions" proposed by UNODC. The workshop participants reviewed each of the points noted by USDEL and supplemented only a few of the points raised, particularly in the area of preventive measures. The points raised by the US delegation are attached at Para 13.

CHIEF EXECUTIVE BOARD (CEB) MEETING

¶10. On the afternoon of January 28, UNODC hosted its annual CEB meeting, attended by representatives of UN international

organizations and with a number of Member States participating as observers. UNODC explained the goal was to establish an integrity protocol between CEB members highlighting desirable practices and standards to achieve goal of fighting corruption. This "Integrity Initiative" reflects the commitment of Secretary General to hold UN organizations and staff to the highest integrity standards. Participation is voluntary and one organization (IMF) has decided not to join the effort. Participating entities are asked to utilize the principles embodied in the UNCAC to upgrade their existing integrity standards and, thus, move to some common level of convergence in their individual agency standards

¶11. UNODC noted during the meeting that the Integrity Initiative had yet to achieve full compliance by all the agencies that had voluntarily agreed to participate, and warned that if this goal is not realized by the next COSP, then IO's will appear to be less than committed to fighting corruption. Much of the discussion centered somewhat distractingly around the posting of IO questionnaires and other documents relating to the initiative to a website maintained by UNODC. The fact that the website was determined to be accessible to those outside the participating IO's caused at least one IO to request the removal of its information. The CEB discussed making the integrity initiative a permanent agenda item for the UN High Level Committee on Management (HLCM), but no decision was taken.

From the discussions, it emerged that there may be merit at the third COSP to a decision calling upon Secretaries General of IO's to fully embrace the UNCAC principles, encourage all CEB members to participate in the voluntary Integrity Initiative, and urge all participants to provide UNODC proper information on their efforts for posting at the UNODC website.

¶12. COMMENT: Several factors contributed to the success of the workshop on international cooperation. The breadth and depth of experience of a number of delegations, including USDEL, resulted in lively and meaningful exchanges. But as expected, some Member States sent only their Vienna representatives, who lacked subject matter expertise. USDEL literally saved the international cooperation workshop by pushing for the group to adopt a summary of discussion in the face of general reluctance to do so. The resulting recommendations, based largely on the USDEL proposals, will now form the basis for further action and dialogue on these issues, particularly during the third COSP to be held in Doha in November. END COMMENT

¶13. Begin text of USDEL proposal:

Many member states and IOs expressed a positive opinion supporting the workshop and the hope that this open-ended dialogue will continue;

Member states should continue to use their voices and votes in those IOs in which they participate to ensure that those organizations embrace the UNCAC principles;

Reiterate the consensus that the existing international legal regime with respect to the privileges and immunities of IOs, including the right and duty of IOs to waive immunity when the interests of justice so require and the immunity can be waived without prejudice to the interests of the organization, [needs no modification.];

In light of the alignment of interests of the public international organizations and the member states of the CAC, and continuing to respond to the mandate of the General Assembly in Resolution 58(4), paragraph 6, participants in the workshop recommend that IOs and member states take the following actions:

A Establish contact points in both the states and the organizations to facilitate the exchange of information regarding the bribery of officials of the international organizations.

¶B. Those points of contact should meet regularly, first to establish lines of communication and thereafter to address relevant issues of common concern as they arise.

¶C. As a preliminary matter, these discussions should include (1) local practice with respect to recovery of assets; (2) collection of evidence; and (3) chain of custody.

Those organizations that don't already have a written policy with respect to cooperation with national authorities in corruption cases should adopt such a policy consistent with the principles set forth in the Convention.

The policies of all international organizations should include:

¶A. Recognition of the organization's obligation to facilitate the proper administration of justice and therefore to notify the competent national authorities of credible allegations of corruption as early as possible.

¶B. A uniform and principled approach to notification and cooperation.

¶C. A recognition that in certain case more than a single state may be competent to exercise jurisdiction over the alleged offense, and that there may be limits on the capacity of any one such state to respond effectively.

Public international organizations should explore ways to develop

common approaches in cooperating with national authorities in member states.

Take note of the importance of implementing preventive measures in the international organizations in combating corruption. These include: (1) creation and application of an internal audit function; (2) establishment of an independent investigative body; and (3)

contractual audit rights. END TEXT

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